No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION

BENJAMIN L. BROWN,
City Solicitor,
*AMBROSE T. HARTMAN,
Deputy City Solicitor,
L. WILLIAM GAWLIK,
Assistant City Solicitor,
City Hall,
Baltimore, Maryland 21202,
(301) 396-3298,
Attorneys for Mayor and
City Council of
Baltimore, Respondents.

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**Counsel of Record*

The Daily Record Co., Baltimore, MD 21202

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do the provisions of Baltimore's retirement ordinance pertaining to mandatory retirement of firefighters satisfy a reasonable federal standard under this Court's ruling in *EEOC v. Wyoming*?

2. Where a municipality, pursuant to its obligation to protect the safety of its citizens, imposes an age 55 BFOQ on its firefighters, what standards govern the review of that BFOQ by a trial court evaluating an ADEA Section 4(f)(1) defense?

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondent Mayor and City Council of Baltimore respectfully prays that the Petition for a Writ of Certiorari of Robert W. Johnson, et al., (the individual petitioners) and the Petition for a Writ of Certiorari of the Equal Employment Opportunity Commission (EEOC) be denied.

COUNTERSTATEMENT OF FACTS

The Mayor and City Council of Baltimore ("Baltimore") has been in the vanguard in protecting its employees from the effects of arbitrary age discrimination. Baltimore's retirement legislation reflects sound and farsighted judgment, and the resulting retirement ordinances contain legislative determinations ultimately adopted wholecloth by our national government.

In the early 1900's, it was an article of faith throughout this country that an employee's productive life ended at

age 65, the age at which retirement was permitted (or required) under the laws of this nation and other western countries. Baltimore shattered this "stereotypical assumption" in 1926 when it adopted the Employees Retirement System of Baltimore (the "ERS"). Baltimore City Code, Article 22, Sections 1-16, 42-43. Baltimore's legislature investigated the issues, and determined that the national assumption was wrong — there was sound justification for allowing employees to continue at work until age 70. Thus, despite the ubiquitous limit of age 65, Baltimore reached the legislative judgment that employees should be allowed to work until age 70; a legislative judgment shared by our national government fifty-two years later.

It was from the ERS plan, which permitted (and today permits) an employee to work until age 70 that the Fire and Police Employees Retirement System of Baltimore (FPERS) was cleaved. Baltimore City Code, Article 22, Sections 29 *et seq*. The FPERS, which contains the mandatory retirement provisions at issue here, was created at the demand of the firefighters and police officers — the contemporaries of the individual petitioners (except Porter). In fact, the petitioners and their cohorts approved the adoption of the FPERS by an affirmative vote.

The fight by police and fire unions to remove themselves from the ERS began in the 1950's, when the firefighters' union complained to Baltimore that the plan was not responsive to their special needs. According to the uncontradicted evidence before the district court, the police and fire unions produced persuasive evidence before Baltimore's City Council that the average firefighter or law enforcement officer was dying before he had the chance to retire under the ERS. The firefighters proved that, according to the mortality studies, the average member of the ERS who was in the fire service would die

at age 59 — before the earliest age of voluntary retirement in the ERS, which is age 60. The union complained bitterly that the average firefighter would be employed for his entire working life in the Baltimore City Fire Department, and, because of the rigors and hazards of his job, was deprived of the opportunity to enjoy even the briefest period of retirement.

Baltimore's Fire Chief, Peter O'Connor, Jr., rose through the ranks from firefighter to chief of the department in the course of his 27 years with the Baltimore City Fire Department. Chief O'Connor testified before the district court that as a young firefighter, he was keenly aware of the deficiencies of the ERS as a retirement plan for firefighters. In his words, "[The proponents of the new pension plan] had mortality tables at that particular time that indicated that firefighters on an average were succumbing at the age of 59, which theoretically meant that they would never live to enjoy their retirement benefits, which were predicated on age 60, and if you had not achieved the age of 60 under the old ERS benefits, there was a drastic reduction for each year prior to your reaching the mandatory retirement age, even if you satisfied the requirement [of] 30 years, if you were [a Plan] A member . . . or whether you satisfied the 32 and a half year requirement of the [Plan] B system." Transcript, p. 763, Joint Appendix, p. 731. To protect the citizens of Baltimore and the firefighters themselves, the union argued, it was necessary to require retirement at age 55.

Charles L. Benton, Baltimore's Director of Finance, was one of the four persons appointed to investigate the deficiencies of the ERS. Mr. Benton testified that "[T]he Board of Estimates appointed our committee out of a growing concern by the city as well as the fire unions, Firefighters Association and Fire Officers Association, of

the number of injuries that was being experienced, the number of disabilities and the number of deaths that were related to fire suppression activities, not only a concern for the welfare of these individuals but a concern about the public generally." Despite the additional cost of one and one-half million dollars annually, Baltimore adopted the new retirement provisions "because of . . . compassion and because of the the safety of the individuals performing these tasks as well as the general public welfare." Transcript. p. 958, Joint Appendix, p. 918.

Baltimore's response to this legislative investigation was to create the most liberal retirement system in the State of Maryland, structuring benefits for protective service occupations so that retirement would occur for these employees several years before the average date of death. The age of 55 was selected on the basis of the information provided to Baltimore by the affected employee unions, and the benefits were elevated to ensure that similarly situated employees were treated equally across the board. The age of earliest elective retirement was lowered to age 50.

In 1974, the Congress established a mandatory retirement age of 55 for, *inter alia,* federal firefighters. The legislative history reveals that Congress made identical legislative findings with respect to federal firefighters. That same year, Congress extended the Age Discrimination in Employment Act, 29 U.S.C Section 21 et seq., to political subdivisions.

Shortly after the 1979 amendments to the ADEA took effect, which amendments prohibited a plan from including a mandatory retirement age unless it was a bona fide occupational qualification (BFOQ) under Section 4(f)(1), the firefighters' union — the very entity which demanded the FPERS in 1962 — sponsored this civil action on behalf of the individual petitioners.

In addition to the legislative history set forth above, all parties produced expert testimony before the trial court. All experts expressing opinions recognized that heart disease is the number one killer in this country; that firefighters suffer from heart disease at twice the rate of the general population; that in a signifieant number of cases, the first symptom of heart disease is death; that of ten or so readily measurable traits, age less than 55 versus age greater than 55 is the *only* statistically significant predictor of heart disease[1]; that aerobic capacity (stamina) declines linearly and inexorably with age; that the physical status of firefighters can be correlated to the general population (i.e., that on average, a firefighter is not better conditioned or healthier than anyone else his age); that merely wearing the protective gear of firefighters consumes almost one third (27%) of a person's aerobic capacity; that firefighting involved near maximal exertion for protracted periods of time under profound threats to the person, such as emotional stress, extremes of temperature, the presence of poisonous gasses such as carbon monoxide and other combustion products; and that testing the physiological parameters such as stamina, sight (visual acuity and dark adaptation), reaction time, hearing, thermoregulation and so forth under conditions of smoke, heat, and oxygen deprivation was, in the words of Baltimore's expert, "[w]ithin the wit of mankind." There was sharp disagreement on whether this kind of testing was practical, safe or reasonable. There was testimony that by administering a battery of cardiological tests, predictions about a firefighter's future cardiovascular health could be made.

[1] Plaintiffs' Exhibit 24(e), the graph reproduced in the Appendix indicates, across the top, that the probability these data result from chance (p) is less than 0.05. There is a statistically significant relationship between age less than 55 or age 55 or greater and the incidence of coronary death, saphenous vein (bypass) grafting, etc.

According to Chief O'Connor, "without a doubt" the work of a firefighter has become much more arduous since the adoption of the FPERS in 1962. Transcript, p. 763, Joint Appendix 733. There has been a reduction in the number of first line firefighting units. The weight of the breathing apparatus has increased sevenfold. Transcript, p. 722, Joint Appendix, p. 740. There is not a company in the City which has not had a fourfold increase in their number of responses per year, and some of the companies have actually increased as much as eightfold. Transcript p. 676, Joint Appendix, p. 735. Chief O'Connor further testified that three firefighters, supervised by an officer, are now required to do the same work which previously had been done by five firefighters, supervised by an officer. Transcript, p. 884, Joint Appendix, p. 801.

According to Chief O'Connor, "when it comes to doing the overhaul operations,[2] when it comes to readying the apparatus, when it comes to who's going to run up in the tower and run back down, climb that 50 or 60 feet, that's generally a younger man's job, and it's been that way ever since I've been in the department." Older men move into the slower moving companies, and their younger counterparts "look out" for them.

REASONS FOR DENYING THE WRIT

At the outset it should be noted that this case deals only with public servants whose sole function is to protect the

[2] "Overhauling" or "sparking" is the process whereby an extinguished structure is partly razed after a fire is "knocked down," i.e., ceilings are pulled down and interior walls are knocked out to ensure that smoldering embers do not reignite. Because this work is very strenuous, and because there is no apparent danger, firefighters, including the petitioners, often remove their air masks. Combustion often continues though, and firefighters who are doing this strenuous work breathe carbon monoxide, a colorless and odorless poison which can precipitate heart attacks.

public from the tragedy of fire. These few employees are on the very cutting edge of public safety; there is precious little in the operation of Baltimore's fire department that is not dictated by necessity. Other cases cited relating to piloting aircraft, law enforcement and inter city bus driving pertain to occupations which are much less demanding than firefighting. Those jobs involve preparedness for emergency situations, whereas firefighting is almost nothing but emergency response. A firefighter guiding a pumper down ice slicked roads or wrestling an eighty eight thousand pound "snorkel" fire truck[3] through congested city streets uses the same intensity and brute force whether responding to a false alarm or a three-alarm high-rise hotel fire. Avoiding hazardous situations, making snap emergency judgments, and using supreme physical force to save lives are not remote contingencies, but are constant challenges which must be fought and won every day. Failure to meet these challenges results in serious injury to the public or other firefighters, or, if Baltimore is fortunate, just the destruction of personal property. *If firefighting in Baltimore's metropolitan area does not warrant a reasonable BFOQ under the ADEA, then the BFOQ defense does not exist.*

THE CIRCUIT COURT CORRECTLY DETERMINED THAT RELEVANT FEDERAL STATUTORY PROVISIONS SET REASONABLE FEDERAL STANDARDS AGAINST WHICH TO JUDGE BALTIMORE'S RETIREMENT ORDINANCE.

Twenty-nine C.F.R. Section 860.102 provides the following illustration of BFOQs: "Federal statutory and regulatory requirements which provide compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and con-

[3] Some of these vehicles are not equipped with power steering, and driving fire apparatus is so strenuous that the union won additional compensation for the drivers. Transcript, p. 780, Joint Appendix, p. 748.

venience of the public." Obviously, the BFOQ test *may* consist of the two-prong test of *Arritt v. Grissell,* 561 F.2d 1267 (4th Cir. 1977), but it is equally clear from this language that BFOQs are not limited just to that test. Such statutory and regulatory provisions are "reasonable federal standards" in keeping with this Court's decision in *EEOC v. Wyoming,* 460 U.S. 228 (1983).[4]

Regarding the mandatory retirement of federal firefighters and police officers codified as 5 U.S.C. Section 8335(b), Senator Percy stated, "It is the intent of this legislation to help federal law enforcement and firefighters agencies maintain a relatively young, vibrant, and effective work force, both for the safety of the individual officers and for the society which they serve." Hearings on H.R.9281, Before the Subcomm. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 98rd Cong., 2d Sess. (April 24, 1974). "The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so

[4] EEOC intimates in its petition that this Court's opinion in *Wyoming* is authority that federal statutes may not be BFOQs under the ADEA. *Wyoming* was EEOC's direct appeal of the grant of Wyoming's motion to dismiss on Tenth Amendment grounds. The instant case was on appeal to the Fourth Circuit at the time, and Baltimore petitioned for certiorari before judgment so that this Court might have the benefit of an example of the application of BFOQ standards to a factual record. EEOC and the individual petitioners opposed the petition, and it was denied.

EEOC's reason for opposing Baltimore's petition was that since Wyoming had not asserted that the mandatory retirement age was a BFOQ within the meaning of Section 4(f)(1), *EEOC v. Wyoming, supra,* Brief for the Equal Opportunity Commission, p. 10-11, n.4, Baltimore's request to examine the BFOQ issue was an "attempt to broaden the question presented in *EEOC v. Wyoming." Mayor and City Council of Baltimore v. Johnson, et al.,* Pet. Docket No. 81-1112 (October Term, 1981), Brief for Equal Opportunity Commission in Opposition, p. 9. The matter of the BFOQ defense was not before this Court in *Wyoming,* perhaps in part because of EEOC's opposition.

as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be comprised, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing than most in the Federal Service." S. Rep. No. 93-948, 93rd Cong., 2d Sess. (1974), p. 2. Federal firefighting may be as much as thirteen times safer than state or local firefighting. *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers,* Subcomm. on Compensation and Employee benefits of the Sen. Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (October 5, 1978), p. 13.

Throughout the legislative history of the ADEA, Congress was careful not to put "a straight jacket on endeavors which have a safety involvement." Hearings on Retirement and the Individual before the Senate Select Committee on Aging, 90th Cong. 1st Sess. at 103-104 (remarks of Senator Pell). Representative Weiss referred to the bona fide occupational qualification as applying "to the area of hazardous occupations" and as "exempting workers in hazardous occupations from the protections of the Act." 17 Cong. Rec. E5875-6 (daily ed. Sept. 26, 1977) (remarks of Rep. Ted Weiss). In considering the 1978 amendments to the ADEA, Representative Weiss repeated these remarks. 5 Cong. Rec. H2276 (daily ed. March 21, 1978).

It is clear that the Congress made legislative findings which parallel those made by Baltimore more than a decade earlier. Other language quoted by the Fourth Circuit is even more explicit regarding the Congressional intent underpinning the federal mandatory retirement law. 731 F.2d at 212-3. If there is any difference at all between the process Baltimore used to establish its mandatory retirement age, and the process used by

Congress to arrive at the same judgment, it is that Baltimore's conclusion is better grounded in fact, and more warranted by the exigencies of the work.

THE CONFLICT IS OVERSTATED

A conflict among the circuits will not justify review unless it is "real and embarrassing." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955), quoting *Layne and Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923). There is no such conflict here, and to the extent that differences existed between the circuits after the *Wyoming* decision, they are quickly being eliminated. Cases decided before *Wyoming,* such as the district court's opinion below, impose an impossible burden on political subdivisions, because district courts found that, no matter how expensive, dangerous or convoluted a given testing procedure was, its mere existence destroyed the "reasonableness" of an employer's actions. Second, and more important, the early opinions of *Arritt v. Grissell,* 567 F.2d 1267 (4th Cir. 1977), *Orzel v. Wauwatosa,* 697 F.2d 743 (7th Cir. 1983) and *Touhy v. Ford Motor Company,* 675 F.2d 842 (6th Cir. 1982) reverse district courts where BFOQs were found to exist based upon affidavits and legal conclusions without relating the employer's practices to "reasonable federal standards." The individual petitioners place much reliance on the fact that the Fourth Circuit distinguished its BFOQ analysis from the holdings in *Arritt;* a position which boils down to the complaint that certiorari review is warranted when a Circuit revises its own rulings. Petition for a Writ of Certiorari in No. 84-518, pp. 5-6. Furthermore, *EEOC v. Missouri State Highway Patrol,* ___ F.2d ___, Case Nos. 83-1287, 83-1850 (8th Cir. Nov. 12, 1984), supports the Fourth Circuit's theory in this case.

THE NINTH CIRCUIT

Petitioners cite *EEOC v. County of Los Angeles,* 706 F.2d 1039 (9th Cir. 1983), *cert. denied* 104 S. Ct. 984

(1984), as authority that the Ninth Circuit is at conflict with the decision here. The Ninth Circuit has recently revised its view, and adopted a position remarkably consistent with the Fourth Circuit's reasoning here. In *Gathercole v. Global Associates,* ___ F.2d ___ (9th Cir. 1984), 34 FEP Cases 502, the Ninth Circuit reversed the judgment of the district court that the employer was liable under the ADEA for terminating the plaintiff's employment as a pilot under the FAA's "Age Sixty Rule." The plaintiff was employed as a pilot on aircraft which were not designated as "commercial," and therefore operation of the aircraft was not regulated by the "Age Sixty Rule" contained at 14 C.F.R. Part 11. See *Gathercole v. Global Associates,* 545 F. Supp. 1280 (N.D. Cal. 1982) at p. 1282. The district court took the same position as the EEOC here, that other federal policies were reviewed simply under an "arbitrary and capricious" standard, and did not affect the duties of private employers. The Ninth Circuit rejected this argument, and ruled *"as a matter of law"* that Global's actions in discharging Gathercole met the standard for exculpation established by the BFOQ provisions of the ADEA. *Id.,* FEP Cases 503 (Emphasis in original). This case is noteworthy because it did not involve a governmental employer, and therefore did not raise the constitutional issues found by the Fourth Circuit in this case.

THE SEVENTH CIRCUIT

In the Seventh Circuit, the Court of Appeals has recently held that proof of a parallel federal provision is a form of evidence upon which an employer might rely to justify its practices. *Heiar v. Crawford County,* ___ F.2d ___, Case Nos. 83-1872, 83-2149, 83-2166, 83-3139 (7th Cir. August 20, 1984). In the *Heiar* case, the Seventh Circuit stated that it was proper for an employer to introduce the legislative history of parallel federal provisions, because while "[l]egislative history is not a

conventional source of 'evidence'; . . . [t]he determination whether a particular retirement age is reasonably necessary is sufficiently remote from the usual kinds of factual determinations courts are called on to make justifies the broadest possible conception of what is 'evidence'." The court went on to hold that under the facts of that particular record before it, the legislative underpinnings of the parallel federal act, 5 U.S.C. Section 8335(b), were insufficient to warrant reversal of the district court because other facts demonstrated that the county had an insufficient interest in its mandatory retirement age. Rather than holding that the rationale used by the Fourth Circuit was inherently wrong, the court concluded that in the case before it, the evidence "belies any claim that the county thinks the sheriff's department should be composed of "active, vigorous, physically capable men [as stated in the legislative history behind U.S.C 8335(b)]."

Another key distinction between the *Heiar* case and this one is that in *Heiar,* there is no indication that the court had before it the legislative history of the *county's* ordinance. The legislative history of Section 8335(b) is well known, and the reasons for establishing the age 55 limit in that statute are clear. In the instant case, it is beyond question that Baltimore's retirement provisions were good faith legislative judgments regarding how best to compensate employees while protecting the public. The absence that evidence in *Heiar* puts it on a lower plane than the instant case. What the Seventh Circuit will do in a case where the employer proves that its only real concern is the physical preparedness of its firefighters remains unsettled.

THE JUDGMENT OF THE CIRCUIT COURT SHOULD NOT BE DISTURBED FOR OTHER REASONS

The Fourth Circuit reversed the district court on but one theory presented; because it found that comparable federal

statutes were a reasonable standard against which to judge Baltimore's retirement ordinance, it did not reach other crucial grounds presented for reversing the district court. In order to do justice to the citizens of Baltimore, it is essential that if the Fourth Circuit's judgment is going to be reviewed, these other grounds must be examined. This is particularly true in light of the very recent case of *EEOC v. Missouri State Highway Patrol, supra,* in which the Eighth Circuit reversed identical factual conclusions of a district court predicated upon the testimony of the same expert witnesses offered by Baltimore.

While it is a general proposition that most inquiries related to the BFOQ should be adjudicated on a case by case basis, there are aspects of the evidence in these cases which are invariant. For example, the state of the art of cardiology is the same in Baltimore as it is in Missouri, and if it is impractical for the State of Missouri to test certain physical attributes, it should be no less impractical for a municipality like Baltimore. The expert testimony adduced in these cases is predicated upon the interpretation of a finite body of scientific research. The ability to test crucial physiological parameters should not be different in Baltimore than in Wyoming, and the impracticality of predicting cardiovascular status in Pennsylvania should not be any less impractical forty miles south in Baltimore.

The district court in the *Missouri State Highway Patrol* case was presented with the expert testimony of Dr. Albert Antlitz, cardiologist, and Dr. Alexander Lind, physiologist — the very same experts who testified for Baltimore below. The district court rejected the testimony of Drs. Lind and Antlitz, siding with the experts produced by the EEOC. The Eighth Circuit Court of Appeals reversed the district court's factual conclusions, finding that the district court was clearly erroneous when it ignored the testimony of Drs. Lind and Antlitz. The Eighth Circuit held that the State of Missouri had demonstrated a sufficient factual

basis for its mandatory retirement for the job of state trooper because the testimony of Drs. Lind and Antlitz, properly viewed, required a finding that the Patrol had proved that 1) all or substantially all of the members of the class above the mandatory retirement age would be incapable of performance, and 2) that there were cardiovascular traits which were untestable and which jeopardized safe and efficient performance. The evidence produced by the EEOC, and rejected by the Eighth Circuit, is *precisely the same* battery of tests as accepted by the district court in the instant case.[5]

It is unlikely that the state of medical knowledge *decreased* between the time Drs. Lind and Antlitz testified in Baltimore, and the time they testified in Missouri. Furthermore, in every case in which Drs. Lind and Antlitz have testified, the opinions have been accepted as fact, or adverse decisions have been reversed on appeal.

[5] The district court in *Missouri Highway Patrol,* just like the district court below, relied upon the testing paradigm set forth in an article by Dr. Robert A. Bruce, *Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Heart Disease in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study,* American Journal of Cardiology, Vol. 46, Sept. 1980, p. 371. In short, it attempts to assess cardiovasular status by measuring traditional risk factors such as age, exercise risk predictors, and ultimately, very sophisticated diagnostic procedures such as radioactive thallium-201 exercise myocardial perfusion imaging, radiotechnecium ventriculography, coronary catheterization, and coronary cineangiography.

The Eighth Circuit reversed the conclusion of the district court regarding the testability of coronary health, which conclusion was based upon testimony that, in the case of those who have no traditional risk factors "you can determine with a probability of .017 that in the next five years . . . that individual will not have a cardiovasular event . . ." *EEOC v. Missouri State Highway Patrol, supra,* slip op. at 16. This is exactly the same evidence accepted by the district court in the instant case. As perceptive as the Eighth Circuit's opinion is, the testing paradigm is more seriously flawed than the Court found.

The district court in the instant case was taken with one of plaintiffs' experts, who had not conducted research on his own in a decade. This expert, a Dr. Fox, testified chiefly about work done by Dr. Robert Bruce, from whose article is taken the graph which appears as Appendix 1a, *infra* (Plaintiffs' Exhibit 24(e), Joint Appendix, p. 1519). Dr. Bruce's article posits an experimental series of cardiovascular and physiological tests, which approach was credited by the district court in this case.[6] However, when Dr. Bruce testified about this methodology against Drs. Lind and Antlitz before the trial court in *EEOC v. Wyoming,* No. C 80-0336B (D. Wyo. 1983) on remand from this Court the jury accepted the opinions of Drs. Lind and Antlitz that age 55 was a BFOQ for the job of game warden in Wyoming. Again, it is inconceivable that anyone would be more capable of explaining this complicated theory than Dr. Bruce, the researcher who created it.

Furthermore, no other court has credited Dr. Fox's theoretical views regarding the prediction of cardiac health. A district court in Pennsylvania has recently rejected Dr. Fox's testimony and held that age 60 was a BFOQ for the comparatively serene job of highway patrolman. *EEOC v. Commonwealth of Pennsylvania,* ___ F. Supp. ___, Case No. 83-0321 (M.D. Pa. Oct. 24, 1984).

Finally, the First Circuit has affirmed a district court's adoption of the opinion of Drs. Lind and Antlitz that age 50 is a BFOQ for the occupation of state police officer in Massachussetts. *Mahoney v. Trabucco,* 734 F.2d 35 (1st Cir. 1984), *petition for cert. filed,* No. 84-531. The district

[6] The testing paradigm relates only to cardiovascular status. The panoply of other physical traits which deteriorate with age are not measured by this procedure. The district court below found that testing these other attributes, such as reaction time, vision, etc., under the simulated stresses of fire combat was practical, even though there was no testimony that such a battery even existed.

court's opinion below is clearly an anomaly among the cases across the country.

THE DISTRICT COURT'S PLAN IS UNSOUND

A particularly bizarre aspect of the district court's opinion relates to its findings on coronary artery disease. "Plaintiff's expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age." 515 F. Supp. at 1298. The testimony below was that at age 55, about three-quarters of the average population has at least one significant coronary occlusion. Notwithstanding these concessions, which should have resulted in a judgment for Baltimore, the district court disregarded what petitioners set forth as the "proper" BFOQ test under *Arritt,* i.e., that there exists a trait within the class which is not subject to assessment by testing, and that the trait precludes safe and efficient performance. The district court quoted with approval language from *Aaron v. Davis,* 414 F. Supp. 414 (E.D. Ark. 1976) that it "is the relative ease with which possibly incapacitating defects are detectable which determines whether qualifications imposed by the employer are job related or "reasonably necessary to the normal operation of the particular business," as provided in the Act" 515 F. Supp. at 1299.

The district court found that a battery of tests, some contingent upon the results of others, makes unreasonable Baltimore's reliance upon a mandatory retirement age. These tests include exercise treadmill testing, radioactive thallium-201 exercise myocardial perfusion imaging, radiotechnecium ventriculography, coronary catheterization, and coronary cineangiography. In the one experiment which was done where testing, up to and including cardiac catheterization was performed, some firefighters died simply as a result of exercise treadmill

testing, and nearly 5% of the firefighters required cardiac catheterization. The district court's concept of what kind of testing is "relatively easy" eviscerates even what petitioners advance as the proper BFOQ. In comparison, the case of *Weeks v. Southern Bell,* 408 F.2d 228 (5th Cir. 1969), from which was taken the concept that a relatively easy test eliminated the employer's right to rely upon an assumption, involved an employer who assumed that women were incapable of lifting thirty pound objects. Comparing a requirement to test the ability to lift 30 pounds to the extensive battery of tests required by the district court is absurd.

Baltimore demonstrated that it has "a reasonable basis in fact" for its retirement provisions. That the district court found there might be a more perfect procedure should not eliminate Baltimore's BFOQ, even under the standards put forth by the petitioners. *See Western Airlines v. Criswell,* 709 F.2d 544 (9th Cir. 1983), *cert. filed,* No. 83-1545. Baltimore is unaware of anything in the legislative history of the ADEA which remotely suggests that employers are required to compel their employees to submit to this kind of dangerous and invasive testing at the peril of losing the right to rely upon a "reasonable general rule."

Finally, the district court totally ignored the legislative history of Baltimore's FPERS. There is no mention of Baltimore's uncontradicted evidence on that point, set forth *supra.* No circuit since *Wyoming* was decided has even intimated that local legislative judgment could be discarded.

THE DISTRICT COURTS CONCLUSIONS OF FACT ARE CLEARLY ERRONEOUS.

The district court discounted Dr. Lind's testimony because it found that he based his testimony on one study

of black gold miners in South Africa. Of Dr. Lind's numerous publications in refereed scientific journals, he has authored no less than 45 scientific publications regarding the effects of heat on the human thermoregulatory mechanism. Joint Appendix, pp. 1146-53. These publications span nearly three decades of Dr. Lind's academic and professional life, and result in part from his twelve years of service to Britain's National Coal Board. Dr. Lind's area of specialty while he was the National Coal Board's research Fellow at Oxford University was in the physiology of the mines rescue worker — an underground firefighter performing rescues and fire suppression under the most arduous conditions imaginable. Transcript, Vol. 2, pp. 5, 14, Joint Appendix, p. 936,944. Dr. Lind testified primarily about the decrease in aerobic capacity and other physical attributes with age. His opinion on these issues had absolutely nothing to do with South African miners. To say that the district court was clearly erroneous in its evaluation of Dr. Lind's testimony is to say the very least.

The testimony of the the medical expert presented by Baltimore is not even mentioned in the district court's opinion. In addition to Dr. Antlitz, M.D., Col. Earl Ferguson, Ph.D., a cardiologist, internist, physiologist and flight surgeon for the U.S. Air Force, testified that because of the limitation on coronary testing, it was not practical or reasonable to conduct extensive coronary testing. In rejecting the testimony of Drs. Lind, Antlitz and Ferguson, the district court erred for exactly the same reasons set forth in the *Missouri Highway Patrol* case.

CONCLUSION

The district court's opinion represented a disastrous false step in the days before this Court's opinion in *Wyoming*. The Circuit Court's opinion is correct, and represents the emerging trend among the circuits. Review by this Court is not warranted.

Respectfully submitted,

BENJAMIN L. BROWN,
City Solicitor,
*AMBROSE T. HARTMAN,
Deputy City Solicitor,
L. WILLIAM GAWLIK,
Assistant City Solicitor,
City Hall,
Baltimore, Maryland 21202,
(301) 396-3298,
Attorneys for Mayor and
City Council of
Baltimore, Respondents.

November, 1984

Counsel of Record

APPENDIX

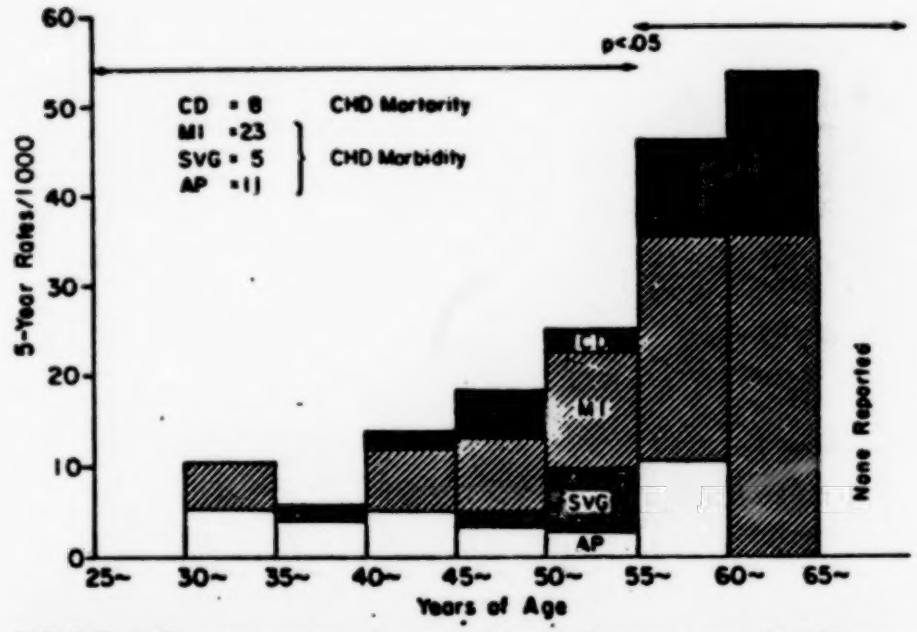

FIGURE 2. Five year rates of coronary heart disease events/1,000 men according to age at initial examination. There were no events in the small groups of persons 25 to 29 years of age and 65 to 69 years of age. AP = angina pectoris; CD = cardiac death; CHD = coronary heart disease; MI = myocardial infarction; p = probability; SVG = saphenous vein bypass grafting procedure.